In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 584

MICHAEL ALLEN SCHMITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of willful failure to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462. On February 27, 1968, he was sentenced to imprisonment for two years. The court of appeals affirmed (Pet. App.). The judgment of the court of appeals was filed on June 11, 1969. A petition for rehearing was denied on July 14, 1969. On August 24, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to September 10, 1969. The petition was filed on September 12, and is thus out of time under Rule 22(2) of the Rules of this Court. In any event, no issue warranting further review is presented.

1. The evidence is not in dispute and is set forth in some detail in the opinion of the court of appeals (Pet. App. 1–4). Briefly, it showed that petitioner registered with the Selective Service System at Local Board 35, Cocoa, Florida, on March 16, 1959, and was thereafter classified I–A. After he had been ordered to report for a physical examination and found acceptable for military service, petitioner, in October 1963, enlisted in the Army National Guard, and accordingly was reclassified I–D. Pursuant to the obligation he incurred, petitioner served six months of active duty and thereafter attended periodic drills.

In May 1965, petitioner without excuse failed to attend a weekend drill, which counted as four separate sessions. He was recommended for court-martial, but, after further inquiry, the charges were dropped and the absences forgiven (A. 94, 112).[1] He missed four more sessions in February 1966, and was again recommended for court-martial (A. 102); he missed all or parts of weekend drills in April and May 1966, and failed to perform makeup work within a thirty-day period, bringing his total of unexcused absences to eight within the applicable year, three more than the maximum allowable for satisfactory performance (A. 114). In March 1966, petitioner had requested a discharge or transfer on the ground of having an incompatible occupation, *viz.*, a seven day a week newspaper route. After an investigation, military authorities concluded that petitioner was not entitled to the change in status that he had requested (A. 97).

[1] "A." refers to the appendix filed by petitioner with the Clerk of this Court.

Following the 1966 absences, petitioner was certified by the National Guard to the local board as having performed unsatisfactorily, in accordance with the provisions of 50 U.S.C. App. 456(c)(2)(D) and 32 C.F.R. 1631.8,[2] making him subject to priority induction without change of classification. His local board thereafter ordered him to report for induction on June 13, 1966.

On the appointed date petitioner reported to the induction station and underwent the customary preinduction processing. He then refused to take the step forward symbolizing entrance into the Armed Forces, claiming that his induction was improper and that he was awaiting word from his attorney who allegedly was seeking a writ of habeas corpus. The induction officer informed petitioner of the consequences of his refusal, and gave him another opportunity to be sworn. Petitioner again refused (A. 33–34). He was then turned over to the commanding officer, who, after repeating the consequences of refusing induction and affording petitioner another opportunity to submit voluntarily—an opportunity which petitioner refused—allowed petitioner two hours to contact his attorney. When no developments occurred after that delay, petitioner was given yet another opportunity to submit to induction. He refused once more, and was sent home (A. 48–52). Five months later petitioner was indicted for willful failure to submit for induction.

---

[2] The provisions of this statute and regulation are set forth in the opinion of the court of appeals (see Pet. App. 6–7, nn. 5 & 6).

2. In this Court petitioner contends only[3] that the statute providing for the priority induction of National Guardsmen and reservists who fail to serve satisfactorily—50 U.S.C. App. 456(c)(2)(D)—amounts to an unconstitutional bill of attainder since it allegedly inflicts punishment without judicial trial.

a. Initially, it should be noted, this contention has no recurrent or general significance. Since 1967 members of reserve units who fail to participate satisfactorily are, after certification of such unsatisfactory performance, ordered to active duty by the reserve component pursuant to 10 U.S.C. (Supp. IV) 673a for a period of twenty-four months, with credit given for active duty already served. A call to active duty as a result of unsatisfactory performance is thus within the terms of the agreement entered into by all individuals who voluntarily enlisted in the Army National Guard. See *Winters* v. *United States,* 281 F. Supp. 289 (E.D.N.Y.), affirmed, 390 F. 2d 879 (C.A. 2), certiorari denied, 393 U.S. 896.[4]

[3] Petitioner alleged in the court of appeals that as a member of the National Guard he was not subject to induction; that the district court had no jurisdiction to try him; that there was no factual basis for the certification of unsatisfactory performance; that he was not given adequate opportunity to submit to induction or adequate warning of the consequences of his refusal; that the prosecutor's closing argument was prejudicial; and that the evidence was insufficient to support the conviction. All of these contentions were thoroughly analyzed and properly rejected by the court below.

[4] Any complaint that the finding of petitioner's unsatisfactory performance as a National Guardsman was improper, and that he had no way to challenge it, is without merit. The formal statement of unsatisfactory service transmitted to the local board was issued by the commander of the National Guard unit

b. In any event, the statute under which petitioner was inducted was not a bill of attainder, which has long been defined as a legislative act directed at named individuals or easily ascertainable members of private groups in such a way as to inflict punishment upon them without a judicial trial. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324; *United States* v. *Brown*, 381 U.S. 437; *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, 722; *United States* v. *Lovett*, 328 U.S. 303, 315–316. Section 456(c)(2)(D) does not provide for trial by legislature, but merely authorizes the Selective Service System to restore to the top of its induction list without reclassification an individual who otherwise would have been called, but had been deferred by virtue of his National Guard or reserve status, and had failed to fulfill the conditions of such military service. The statute serves a legitimate governmental purpose in seeking to ensure satisfactory performance by those who voluntarily enlisted in the National Guard or a reserve

---

only after he reviewed the findings of a subordinate who had made an investigation of the reasons for petitioner's excessive number of absences from drills. Between the time petitioner was notified of the certification and the issuance of the induction notice he had ample opportunity to request reconsideration. An additional safeguard against arbitrary or capricious certification was the district court's inquiry, out of the presence of the jury, into the circumstances supporting the finding of unsatisfactory performance. The court concluded that there was a basis in fact for the action taken, and the Fifth Circuit observed that there was nothing in the record to refute the correctness of the court's finding (Pet. App. 15–16). In the light of these circumstances, there is no basis for any belief that petitioner was unfairly denied the privilege of serving in the National Guard in lieu of induction.

component. It in no way imposes the type of "punishment" proscribed by the constitutional prohibition against bills of attainder. See *United States* v. *Brown*, 381 U.S. 437, 456–461; *Trop* v. *Dulles*, 356 U.S. 86, 95–97; *Green* v. *Board of Elections of City of New York*, 380 F. 2d 445 (C.A. 2), certiorari denied, 389 U.S. 1048.[5]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
MERVYN HAMBURG,
Attorneys.

OCTOBER 1969.

---

[5] *United States* v. *Gutknecht*, 406 F. 2d 494 (C.A. 8), certiorari granted, 394 U.S. 997 (No. 71, this Term), involves a defendant who, while a civilian classified I–A, dispossessed himself of his draft cards in violation of Selective Service regulations. For this action he was declared a delinquent and was ordered to report for accelerated induction. He refused to submit to induction, claiming that his delinquent status was the result of privileged conduct related to his political views on the Vietnam conflict. That case is clearly distinguishable from the situation of petitioner here, who had voluntarily submitted to military authority by enlisting in a National Guard component and was thereafter ordered to active duty as a consequence of his failure to fulfill the conditions of his enlistment contract. Disposition of this case, therefore, is not dependent upon and need not await the outcome of *Gutknecht*.

U. S. GOVERNMENT PRINTING OFFICE: 1969